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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/634,087	08/08/2000	Phillip M. Braun	00216-489001	4905

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FISH & RICHARDSON PC  
225 FRANKLIN ST  
BOSTON, MA 02110

EXAMINER
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SPISICH, MARK

ART UNIT	PAPER NUMBER
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1744

DATE MAILED: 11/17/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/634,087

Applicant(s)

BRAUN ET AL.

Examiner

Mark Spisich

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 September 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3-5,7-39 and 41-44 is/are pending in the application.
- 4a) Of the above claim(s) 4,5,18-20,24-39,41 and 42 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3,7-17,21-23,43 and 44 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
- a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

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## **DETAILED ACTION**

### ***Election/Restrictions***

1. Claims 4,5,18-20,24-39,41 and 42 remain withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention/species, there being no allowable generic or linking claim. Election was made **without** traverse in Paper Nos. 11 and 13. Upon the allowance of an apparatus claim, the method claims 41-42 (upon amendment to include all of the limitations of the allowed apparatus claim(s)) will be rejoined.

### ***Claim Rejections - 35 USC § 112***

2. Claims 7,43 and 44 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Each of the noted claims recite a numerical value without its associated dimensional unit. Width and radius of curvature are not unitless quantities. Applicant should review the claims for any additional informalities.

### ***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1,3,17,22,43 and 44 are rejected under 35 U.S.C. 102(b) as being anticipated by Thomas et al (USP2,246,867). The patent to Thomas discloses an oral care device comprising a head (10) as well as a rocking element (16) having a plurality

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of protrusions (17) radially extending from a central portion thereof. The ribs or protrusions (17) have curved sides (see fig 4) and the recitation of the "radius of curvature" in the absence of a dimensional unit (claims 43 and 44) renders these claims essentially meaningless insofar as that numerical value is concerned. The ribs or protrusions further taper from a relatively wide base to a relatively narrow tip. The phrase "shaped to..." (claim 1, lines 7-8) does not define any structure and is not an adequate substitute for the actual recitation of the structure of the protrusions which results in this. The rocking element (17) does include an "opening" (15) (claim 17) and pin (18) reads on the recited mounting element (claim 22).

5. Claims 1,3,22,23,43 and 44 are rejected under 35 U.S.C. 102(b) as being anticipated by Birch (USP 3,230,562). The patent to Birch discloses an oral care device (10) comprising a head (14) and a rocking element including a central portion (18) and a plurality of radially extending protrusions (20) which are tapered towards the free ends thereof. The elements (18,20) of Birch (as are those of the present application) are made of elastomeric material (rubber) and are perfectly capable of rocking as the device is used. Birch also teaches that the element(s) may be mounted to the head with a mounting element (32) as in claim 22. The claims (namely claims 43 and 44) do not recite any particular details of the nature of the sides' "curvature" relative to the base and tips of the protrusions and merely recite "a" radius of curvature somewhere on the protrusions. As the cross-sections of the protrusions of Birch are circular, the "sides" thereof arcuate and would have a "radius of curvature". It is again noted that claims 43-44 do not recite a dimensional unit. With regard to the recitation of "along the

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longitudinal axis of the body", it is noted the central protrusion of the present application is the one that actually penetrates the interproximal are and it does NOT extend along the longitudinal axis. Although it would appear that applicant is attempting to recite fact that the "rocking elemen(s)" of fig 1 are essentially planar and the plane defined by the elements are generally aligned with the axis, the claim(s) only refers to the protrusions. The middle three protrusions (20) of Birch (see fig 4) are along the "axis" to the same degree as the middle one of the present invention.

**(1) Claim Rejections - 35 USC § 103**

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Birch (USP 3,230,562) in view of UK 2,214,420). The patent to Birch discloses the invention substantially as claimed with the exception of the element being co-molded with the head. '420 discloses the co-molding of an elastomeric tooth contacting medium (5) with the head (2). It would have been obvious to one of ordinary skill to have modified the device of Birch as such so as to produce a more permanent connection between the two.

8. Claims 7-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Birch (USP 3,230,562). The patent to Birch discloses a similar material (rubber) to that disclosed in the present application as well as protrusions having the recited taper, etc.

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The particular dimensions and durometer reading of the noted claims would be obvious to one of ordinary skill to suit the particular user.

9. Claims 1,3,7-16,22,23,43 and 44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mark (USP 4,403,623) in view of Birch (USP 3,230,562). The patent to Mark discloses a combined toothbrush and gum massaging device wherein the brush head (13) thereof is adapted to be oriented to two positions relative to the longitudinal axis of the handle or body (12). It would have been obvious to one of ordinary skill to have substituted the brush/massaging head of Birch for that of Mark as it is shown by the art to be an art-recognized equivalent structure for brushing and massaging. With the head in the orientation of fig 2 of Mark, the "rocking elements" of Birch would be oriented as claimed. See the comments above for the remaining claims.

10. Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Mark (USP 4,403,623) and Birch (USP 3,230,562) as applied to claim 1 above, and further in view of UK 2,214,420. See paragraph #7 above.

***Allowable Subject Matter***

11. The following claim drafted by the examiner and considered to distinguish patentably over the art of record in this application, is presented to applicant for consideration:

An oral care device comprising:

a body defining a longitudinal axis having a head shaped for insertion into the oral cavity, the head being elongate and the longitudinal axis thereof is aligned with that of the body; and

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a rocking element mounted on the head, the rocking element being generally planar and oriented generally along the longitudinal axis of the body, the rocking element including a central portion and a plurality of protrusions extending radially from the central portion, wherein the protrusions taper from a relatively wide base to a relatively narrow tip and further wherein each of the protrusions includes opposed concave side surfaces extending from the wide base to the narrow tip thereof, the concave side surfaces having a radius of curvature from about 0.150 to 0.175 inches, and wherein the tips are shaped to penetrate the interproximal and subgingival regions of the oral cavity.

### ***Response to Arguments***

12. Applicant's arguments filed 26 September 2003 have been fully considered but they are not persuasive. The noted differences between the protrusions of Thomas and that of the present invention have been noted; however, it is felt that the manner in which the protrusions are presently structurally defined in the claims still fails to define over Thomas. "Adapted to" and "such that" phrase are not a substitute for a positive recitation of the structural features which actually support the functional recitation(s). With regard to Birch, it is noted that the claim(s) recite the orientation of the "protrusions" relative to the axis and not the entire body of the "rocking element" (which is probably what applicant really intended to claim). With reference to figure 1 of the present application, the central protrusion itself does NOT extend along the axis (as in now recited in claims 1 and 44) and thus justifies the broad interpretation of this limitation with regard to the middle three protrusions of Birch (in fig 4 thereof). For

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argument sake, a further ground of rejection has been applied to additionally meet the limitation with regard to the "axis". It is additionally pointed out that the "axis" of the body need not be the longitudinal axis of the head.

***Conclusion***

13. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mark Spisich whose telephone number is (703) 308-1271. The examiner can normally be reached on M-Th (6-3:30), Alternate Fri off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert J Warden can be reached on (703) 308-2920. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.



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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

A handwritten signature in black ink, appearing to read "Mark Spisich", with a long horizontal flourish extending to the right.

Mark Spisich  
Primary Examiner  
Art Unit 1744

MS